Filed 5/28/04 City of Coalinga v. Hargrove CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF COALINGA et al.,

Plaintiffs and Respondents,

v.

RICHARD H. HARGROVE,

Defendant and Appellant.

F043270

(Super. Ct. No. 02 CE CG 01953)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Mark W. Snauffer, Judge.

Charlston, Revich & Chamberlin, Howard Wollitz and Allan J. Favish for Defendant and Appellant.

Bacigalupi, Neufeld & Rowley and Craig M. Mortensen for Plaintiffs and Respondents.

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Plaintiffs and respondents City of Coalinga, the Coalinga Public Financing Authority, and the Redevelopment Agency of the City of Coalinga (collectively, the City) filed a lawsuit against their former attorney, appellant and defendant Richard H. Hargrove (Hargrove), among others, for professional negligence and related claims. Hargrove appeals an order denying his special motion to strike certain causes of action

pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP provision.[1] We affirm.

PROCEDURAL AND FACTUAL HISTORIES

The City filed suit against the City of Selma, the Redevelopment Agency of the City of Selma (collectively, Selma), Hargrove, and two law firms (collectively, the Hargrove Attorneys). The first amended complaint alleged eight causes of action, four of which applied to Hargrove: the fourth cause of action for fraud and deceit, the fifth cause of action for professional negligence, the sixth cause of action for conspiracy, and the eighth cause of action for breach of fiduciary duty. The first amended complaint alleged that the City and Selma entered into a written loan agreement under which Selma borrowed $320,000 from the City to finance real property improvements. The complaint further alleged: "Before the Loan Agreement was executed, [Selma] and [the Hargrove Attorneys] falsely and fraudulently represented to [the City] that [Selma] intended to repay the Loan in accordance with the Loan Agreement. These representations were in fact false and [Selma] had no intention of complying with [its] obligations under the Loan Agreement."

The fifth cause of action for professional negligence alleged:

> " … On or before September 1, 1994, [the City] and [the Hargrove Attorneys] entered into written and oral agreements providing that [the Hargrove Attorneys] would serve as [the City's] attorneys for the purpose of representing [the City] in the official fiduciary capacities of, inter alia, City Attorney, Authority Attorney, and Agency Attorney, and in counseling [the City] in general City, Authority, and Agency matters, as well as in acting as [the City's] special 'Bond Counsel' to assist [the City] in the

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[1] A SLAPP is a "'strategic [lawsuit] against public participation.'" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85.) All statutory references are to the Code of Civil Procedure unless otherwise indicated.

acquisition and issuance of public financing, including the financing behind the Loan Agreement.

" … [The Hargrove Attorneys] simultaneously acted as City Attorney for Defendant CITY OF SELMA and Agency Attorney for Defendant REDEVELOPMENT AGENCY OF THE CITY OF SELMA. In these capacities, [the Hargrove Attorneys] advised and represented [Selma] in connection with the Loan Agreement, in conflict of interest with [the Hargrove Attorneys'] professional obligations to advise [the City] and to aggressively advocate and negotiate in [the City's] best interest.…

" … Sometime before September 1, 2001, [the Hargrove Attorneys] advised [Selma] that [Selma] had no further obligation to make periodic loan payments to [the City], and [the Hargrove Attorneys] advised [Selma], therefore, to breach their obligations to [the City] under the Loan Agreement."

The sixth cause of action for conspiracy alleged:

" … On or before September 15, 2001, [Selma and the Hargrove Attorneys] … knowingly and willfully acted in concert to conspire with one another and to agree among themselves to defraud [the City] and to commit the other wrongful acts to damage [the City] …. [Selma and the Hargrove Attorneys] agreed between themselves to draft the Loan Agreement and related documents to favor the interests of [Selma] against [the City], to fraudulently interpret the Loan Agreement to relieve [Selma] of [its] repayment responsibilities to [the City], and to induce [the City] to enter into the transaction with comforting assurances to the contrary."

The eighth cause of action for breach of fiduciary duty alleged:

" … By virtue of the attorney-client relationship … , a confidential relationship existed … between [the City] and [the Hargrove Attorneys], and [the Hargrove Attorneys] owed [the City] a fiduciary duty even after termination of the attorney-client relationship.

" … [The Hargrove Attorneys] abused [the City's] trust and confidence during and after termination of the attorney-client relationship by using [the City's] confidential information against [the City] concerning the Loan Agreement and related bond documents, which information was acquired during [the Hargrove Attorneys'] representation of [the City], and used without [the City's] consent.

" … [The Hargrove Attorneys] gained improper advantage over [the City] in that [the Hargrove Attorneys] used confidential information

obtained from [the City] against [the City's] interest when negotiating and interpreting the terms of the subject Loan Agreement and related transactions while concurrently representing [Selma] in conflict of interest.

" … [The Hargrove Attorneys] advised [Selma] to breach the Loan Agreement to [the City's] damage …."

Hargrove filed a Notice of Motion and Special Motion to Strike the Fifth, Sixth and Eighth Causes of Action as a SLAPP pursuant to section 425.16. The court denied the motion, finding that Hargrove did not meet his burden of making a prima facie showing that the causes of action fall within the confines of section 425.16, subdivision (b)(1). Hargrove appeals that order pursuant to section 425.16, subdivision (j).

DISCUSSION

Hargrove contends that the court erred in denying his special motion to strike the fifth, sixth and eighth causes of action because 1) the non-SLAPP allegations cannot save the complaint and/or 2) the City's claims fall within the definition of a SLAPP suit.

I. Applicable law and standard of review

Section 425.16, subdivision (a), provides:

"The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly."

In the decade since enactment of section 425.16 (see Stats. 1992, ch. 726 , § 2), the anti-SLAPP motion—denominated by the statute as a "special motion to strike" a cause of action (§ 425.16, subd. (b)(1))—has become an increasingly important tool for defendants seeking to terminate proceedings prior to trial.

The anti-SLAPP statute clearly distinguishes between actions arising in connection with governmental proceedings and other controversies. Section 425.16,

subdivision (b)(1), establishes in general terms that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech … in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Subdivision (e) then provides a definition for "act in furtherance of a person's right of petition or free speech" for the governmental and nongovernmental arenas.

In the governmental arena, actions entitled to the anti-SLAPP procedural protections include "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; [and] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law …." (§ 425.16, subd. (e).) Thus, by definition, governmental proceedings and the issues considered within them are "'public issue[s].'" (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116-1117.)

In the nongovernmental arena, the public nature of the matter must be established as a precondition to the granting of the anti-SLAPP motion. (See *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at pp. 1117-1118.) As stated in the statute, actions entitled to the anti-SLAPP procedural protections include "(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with *an issue of public interest*; [and] (4) … any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with *a public issue or an issue of public interest*." (§ 425.16, subd. (e), italics added.)

These definitions establish only the preconditions to the availability of the special motion to strike. They do not immunize conduct that is otherwise actionable—even if the

"publicness" requirement is satisfied, the special motion must be denied if "there is a probability that the plaintiff will prevail on the claim" under the substantive law. (§ 425.16, subd. (b)(1); see also *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1122.) "[T]he statute does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning [citation]; it subjects to potential dismissal only those actions in which the plaintiff cannot 'state[] and substantiate[] a legally sufficient claim' [citation]." (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 93, fn. omitted.)

The California Supreme Court stated that a court's task in ruling on an anti-SLAPP motion to strike involves a two-step process: "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech … in connection with a public issue,' as defined in the statute. [Citation.]" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) If such a showing is made, the court "then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Ibid.*) In making these determinations, the trial court considers the pleadings, as well as the supporting and opposing affidavits stating the facts upon which the liability or defense is based. (*Ibid.*) "Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both reviewed independently on appeal." (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999; see also *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 629.)

With these principles in mind, we examine whether Hargrove has met his burden of a prima facie showing that the City's claims against him fall within section 425.16.

II. Prima facie showing

Hargrove seeks to strike the fifth cause of action for professional negligence, the sixth cause of action for conspiracy, and the eighth cause of action for breach of fiduciary duty on the ground they impinge his right to free speech on an issue of public concern. Specifically, Hargrove argues he is being sued for statements made to Selma in connection with the loan from the City to Selma and statements made to the City that Selma was not liable for the loan. Hargrove contends that the alleged statements were "made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law[,]" and the claims are therefore properly subject to an anti-SLAPP motion to strike. (§ 425.16, subd. (e).)

Citing *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 307-308, Hargrove argues that the non-SLAPP allegations in the causes of action are incidental to claims based essentially on protected activity. *Fox Searchlight Pictures* held that a plaintiff cannot frustrate the purposes of the SLAPP statute by combining allegations of protected and unprotected activity under the label of one cause of action. (*Id.* at p. 308.) However, "it is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on [unprotected] activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188**;** see also *Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679, 686-687.)

Here, the alleged SLAPP allegations are incidental to claims based on unprotected activity. The trial court aptly explained the reasoning:

> "First, Hargrove admits that he represented the City … in negotiating the loan, advising the [City], and drafting the documents. Second, Hargrove

admits that he also represented … Selma simultaneously in connection with the loan (with a conflict of interest waiver). Third, he admits that his statements regarding the default on the loan consisted of legal advice to … Selma. Fourth, Hargrove admits that he made his statements in a 'closed door' session.… Thus, Hargrove's collective activities are not akin to those of an ordinary citizen 'speaking out' at a public meeting on a matter of public concern. [¶] … [¶]

" … Here Hargrove is being sued for conduct arising from his representation of the City … in negotiating, drafting and advising his client regarding the loan transaction. It is true that throughout the First Amended Complaint there is a reference to the fact that Hargrove allegedly informed … Selma to make no further payments on the loan. But, this particular allegation does not form the gravamen for the causes of action based upon professional negligence, conspiracy and breach of fiduciary duty. In sum, in the view of the court Hargrove is primarily being sued because he allegedly breached his duties in failing to protect [the City's] economic interests, not because he gave advice at a public meeting. (See *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, at pp. 76-81.) [¶] … [¶]

" … [The City] [is] not seeking to 'impinge' upon Hargrove's participation in matters of 'public significance'. [Citation.] Instead, he is being sued for legal malpractice and related claims."

The court's analysis is directly on point. Following the trial court's order, the court in *Jespersen v. Zubiate-Beauchamp*, *supra*, 114 Cal.App.4th 624 addressed anti-SLAPP motions to strike in the context of attorney malpractice. The *Jespersen* court found no error in the denial of a special motion to strike pursuant to section 425.16 by attorneys sued for litigation-related malpractice. The court concluded that the alleged malpractice did not arise out of the attorneys' First Amendment right to petition but from their negligent failure to protect their clients' rights in the underlying action. (*Jespersen*, *supra*, at p. 627.) The court reasoned:

"It does not follow … that a legal malpractice action may be subject to a SLAPP motion merely because it shares some similarities with a malicious prosecution action and involves attorneys and court proceedings. '[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity.' [Citation.] And a moving defendant's burden to show a '"cause of action … arising from"' is not met simply by showing that the *label* of the lawsuit appears to involve the rights of free

> speech or petition; he or she must demonstrate that the *substance* of the plaintiff's cause of action was an act in furtherance of the right of petition or free speech. [Citation.]" (*Jespersen*, *supra*, 114 Cal.App.4th at p. 630.)

Here, Hargrove has failed to make such a showing. The City's claims against Hargrove do not fall under the terms of section 425.16. Thus, Hargrove's special motion to strike was properly denied.

DISPOSITION

The May 15, 2003, order denying Hargrove's special motion to strike the fifth, sixth and eighth causes of action of the first amended complaint is affirmed. Costs are awarded to the City.

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Wiseman, Acting P.J.

WE CONCUR:

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Gomes, J.

_____
Dawson, J.